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SUPREME COURT. U. S.

Nos. 232 and 233

IN THE
Supreme Court of the United States

October Term, 1967

UNITED STATES OF AMERICA

Petitioner

v.

DAVID PAUL O'BRIEN

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Petitioner

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE AND BRIEF**

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AMICI CURIAE**

William Sloane Coffin, Jr., Michael Ferber, Mitchell Goodman, Marcus Raskin and Benjamin Spock move the Court for an order permitting them to file the attached brief *amici curiae*. Their interest lies in the fact that they were indicted by a federal grand jury in the District of Massachusetts for conspiracy to counsel Selective Service registrants to fail to have in their possession their registration certificates and notices of classification. A copy of the indictment appears in the appendix to this motion.

Motion for Leave to File Brief Amici Curiae

The applicants respectfully suggest that the Court should not render a decision on the merits as to the construction and constitutionality of Selective Service Regulations relating to the possession of registration certificates and notices of classification. In the applicants' view those issues are not squarely presented by the instant case and should be deferred to a case which does present the issues. These questions can then be fully briefed and argued.

The application was not made within the time required by Rule 42(2) of this Court because the applicants were not indicted until January 5, 1968 and did not retain counsel until some time thereafter.

The Solicitor General has declined to consent to this application. Counsel for the respondent-petitioner O'Brien have given their consent.

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February 6, 1968.

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Indictment—Criminal No. 68-1-F

(50 U.S.C. App. 462(a))

UNITED STATES OF AMERICA

v.

**WILLIAM SLOANE COFFIN, JR., MICHAEL FERBER, MITCHELL
GOODMAN, MARCUS RASKIN and BENJAMIN SPOCK**

1. From on or about August 1, 1967, and continuously thereafter up to and including the date of the return of this indictment, in the District of Massachusetts, the Southern District of New York, the District of Columbia and elsewhere, William Sloane Coffin, Jr. of New Haven in the District of Connecticut, Michael Ferber of Boston in the District of Massachusetts, Mitchell Goodman of New York in the Southern District of New York, Marcus Raskin of the District of Columbia, and Benjamin Spock of New York in the Southern District of New York, the defendants herein, did unlawfully, wilfully and knowingly combine, conspire, confederate, and agree together and with each other, and with diverse other persons, some known and others unknown to the Grand Jury, to commit offenses against the United States, that is,

a. to unlawfully, knowingly and wilfully counsel, aid and abet diverse Selective Service registrants to unlaw-

fully, knowingly and wilfully neglect, fail, refuse and evade service in the armed forces of the United States and all other duties required of registrants under the Universal Military Training and Service Act (50 U.S.C. App. 451-471) and the rules, regulations and directions duly made pursuant to said Act, in violation of 50 U.S.C. App. 462(a).

b. to unlawfully, knowingly and wilfully counsel, aid and abet diverse Selective Service registrants to unlawfully, knowingly and wilfully neglect, fail and refuse to have in their personal possession at all times their registration certificates (SSS Form No. 2), prepared by their local boards, as required by the rules, regulations and directions (32 C.F.R. 1617.1) duly made pursuant to the provisions of the said Universal Military Training and Service Act, in violation of 50 U.S.C. App. 462(a);

c. to unlawfully, knowingly and wilfully counsel, aid and abet diverse Selective Service registrants to unlawfully, knowingly and wilfully neglect, fail and refuse to have in their personal possession at all times valid notices of classification (SSS Form No. 110) which had been issued to them by their local boards showing their current classifications, as required by the rules, regulations and directions (32 C.F.R. 1623.5) duly made pursuant to the provisions of the said Universal Military Training and Service Act, in violation of 50 U.S.C. App. 462(a);

d. to unlawfully, wilfully and knowingly hinder and interfere, by any means, with the administration of the Universal Military Training and Service Act, in violation of 50 U.S.C. App. 462(a).

2. It was a part of said conspiracy that the defendants William Sloane Coffin, Jr., Mitchell Goodman, Marcus Raskin and Benjamin Spock would sponsor and support a nation-wide program of resistance to the functions and operations of the Selective Service System, which said pro-

gram would include, but not be limited to, the interruption of the induction process at induction centers throughout the United States, the public counselling of Selective Service registrants to resist the draft, to refuse to serve in the armed forces of the United States, to surrender their valid Selective Service notices of classification and registration certificates, and the aiding and abetting of such registrants in such activities.

3. It was a further part of said conspiracy that on October 16, 1967, the defendants William Sloane Coffin, Jr., and Michael Ferber and other co-conspirators, some known and others unknown to the Grand Jury, would conduct and participate in a public meeting at the Arlington Street Church, Boston, Massachusetts, which said meeting would be attended by Selective Service registrants.

4. It was a further part of said conspiracy that at the aforesaid public meeting on October 16, 1967, the said Selective Service registrants would surrender possession of their valid notices of classification and their registration certificates.

5. It was a further part of said conspiracy that at the aforesaid public meeting on October 16, 1967, the defendant William Sloane Coffin, Jr. and other co-conspirators, some known and others unknown to the Grand Jury, would accept possession of the aforesaid notices of classification and registration certificates from the said Selective Service registrants for the purpose of tendering the same to the Attorney General of the United States.

6. It was a further part of said conspiracy that the defendants WILLIAM SLOANE COFFIN, JR., MICHAEL FERBER, MITCHELL GOODMAN, MARCUS RASKIN and BENJAMIN SPOCK would accompany a large number of Selective Service registrants and other individuals to the Building of the

United States Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. on October 20, 1967, and participate in a demonstration of resistance against the operations and functions of the Selective Service System.

7. It was a further part of said conspiracy that at the aforesaid demonstration, valid notices of Selective Service classifications and Selective Service registration certificates surrendered and collected at various demonstrations of resistance to the functions and operations of the Selective Service System previously held in various communities throughout the United States, including those surrendered and collected at the aforesaid meeting conducted at the Arlington Street Church in Boston, Massachusetts on October 16, 1967, would be collected by Michael Ferber and other co-conspirators, some known and others unknown to the Grand Jury, and deposited in a common repository.

8. It was a further part of said conspiracy that at the aforesaid demonstration at the United States Department of Justice the defendant William Sloane Coffin, Jr. would address Selective Service registrants and others participating and in attendance at such demonstration, publicly counselling said registrants to continue in their resistance against the draft, to continue to refuse to serve in the armed forces of the United States as long as the war in Vietnam continued and pledging himself and others to aid and abet said registrants in all ways possible.

9. It was a further part of said conspiracy that the defendants William Sloane Coffin, Jr., Mitchell Goodman, Marcus Raskin and Benjamin Spock and other co-conspirators would enter the Building of the United States Department of Justice on said October 20, 1967, and would deliver to the Attorney General of the United States the aforesaid repository containing the said notices of classification and registration certificates.

OVERT ACTS

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. During the month of August, 1967, the exact date being to the grand jurors unknown, the defendants William Sloane Coffin, Jr. and Benjamin Spock distributed and caused to be distributed at New York, New York, a statement entitled "A Call to Resist Illegitimate Authority".

2. On October 2, 1967, the defendants William Sloane Coffin, Jr., Mitchell Goodman, Marcus Raskin and Benjamin Spock held a press conference at the New York Hilton Hotel, Rockefeller Center, New York, New York.

3. On October 16, 1967, the defendant Michael Ferber gave a speech entitled "A Time To Say No" at a meeting at the Arlington Street Church, Boston, Massachusetts.

4. On October 16, 1967, the defendant William Sloane Coffin, Jr., gave a speech at a meeting at the Arlington Street Church, Boston, Massachusetts.

5. On October 16, 1967, the defendant William Sloane Coffin, Jr. accepted notices of classification and registration certificates from Selective Service registrants at a meeting at the Arlington Street Church, Boston, Massachusetts.

6. On October 20, 1967, the defendant William Sloane Coffin, Jr., spoke at a demonstration of resistance against the operations and functions of the Selective Service System at the United States Department of Justice Building, 10th and Constitution Avenue, N.W., Washington, D.C., publicly counselling Selective Service registrants to continue in their resistance against the draft and to continue to refuse to serve in the armed forces.

7. On October 20, 1967, the defendant William Sloane Coffin, Jr., entered the United States Department of Justice Building, 10th and Constitution Avenue, N.W., Washington, D.C.

8. On October 20, 1967, the defendant Marcus Raskin entered the United States Department of Justice Building, 10th and Constitution Avenue, N.W., Washington, D.C.

9. On October 20, 1967, the defendant Benjamin Spock entered the United States Department of Justice Building, 10th and Constitution Avenue, N.W., Washington, D.C.

10. On October 20, 1967, the defendant Mitchell Goodman entered the United States Department of Justice Building, 10th and Constitution Avenue, N.W., Washington, D.C.

11. On October 20, 1967, in the Andretta Room, United States Department of Justice, Washington, D.C. the defendants William Sloane Coffin, Jr., Mitchell Goodman, Marcus Raskin, Benjamin Spock and other co-conspirators abandoned a fabricoid briefcase containing approximately one hundred eighty-five (185) registration certificates and one hundred seventy-two (172) notices of classification together with other materials.

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BRIEF FOR AMICI CURIAE

I.

The instant case presents in the view of the *amici curiae* very serious constitutional problems with respect to the 1965 amendment to the Universal Military Training Service Act, 50 U.S.C. App. § 462(b)(3), as amended, 79 Stat. 586, which the parties have briefed so thoroughly as not to require additional comment.

It does not present the very different problems as to the construction and constitutionality of 32 C.F.R. 1617.1 and 1623.5 which are directly involved in the indictment of the *amici curiae*, a copy of which is attached to their motion.

Those provisions were not set forth in the indictment, were not the subject of the trial judge's charge, and were not the basis of the jury's verdict of guilty in the instant case.

Those regulations were not the subject of the parties' briefs in the Court of Appeals which made them the basis for its judgment of affirmance. The tenuous ground of that court's action may be seen from its reliance upon an ambiguous passage in a memorandum submitted by defense counsel in the district court upon a motion to dismiss the indictment (R. 64). Even the briefs submitted by the parties in this Court do not address themselves with any depth to the issue of possession of draft registration certificates and notices of classification. We think that they were correct in not doing so because that issue is not fairly before the Court for the reasons stated by Mr. O'Brien's counsel.

The *amici curiae*, defendants in the Boston case, are the Chaplain of Yale University, a graduate student at Harvard University, a writer, a scholar in the field of public policy who is the Co-Director of the Institute for Policy Studies, and an internationally known pediatrician and writer. The core of the indictment in that case appears to be an alleged conspiracy to counsel the surrender of registration certificates and notices of classification. Counsel may address themselves at the trial itself and in such appellate courts as may become necessary to the issue of whether it is a crime not to possess such documents.

The following questions, among others, which have not been briefed in the *O'Brien* case will then present themselves:

(1) Did Congress intend that every violation of "this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer or possession of such certificate" be made criminally punishable by a fine of \$10,000 or imprisonment for five years, or both?

(2) Does not 32 C.F.R. 1617.1—the provision relied upon by the Court of Appeals in *O'Brien*, entitled *Effect of Failure to Have Unaltered Registration Certificate in Personal Possession*—mean what its title implies, that the only effect of non-possession is to make it *prima facie* evidence of non-registration?

(3) More specifically, did Congress intend to make non-possession of a certificate a criminal act?

(4) If Congress intended more, (a) where are the legislative standards for the delegation of authority (see *Kent v. Dulles*, 357 U.S. 116), (b) what legislative purpose is advanced by such a regulation—unless the certificate is an internal passport which every citizen must show to the authorities on demand, and (c) is it consistent with due process to require the carrying of such a document?

(5) Is the surrender of the certificate—to the Government itself—a form of protest protected by the First Amendment?

These are some of the issues which in an appropriate case should be presented to this Court. We do not believe this to be that case for the reasons suggested by Mr. O'Brien's counsel. If they are to be considered by the Court in the *O'Brien* case we believe that there should be reargument and the filing of briefs by the parties and by the *amici curiae* directed to those and related issues.

II.

Furthermore, since the gravamen of the conspiracy indictment against *amici curiae* is alleged counselling of persons to commit acts allegedly in violation of the selective service laws, governmental regulation of speech is directly involved and at issue in their case. Among the overt acts by one or more defendants alleged to be in furtherance of this alleged conspiracy are: the distribution of a written statement with respect to the draft and the war in Vietnam, a press conference in New York City,

speeches at a church in Boston, and public counselling of Selective Service registrants at a demonstration at the Department of Justice in Washington, D. C.

None of these allegations or alleged overt acts of this character are present in the record of the *O'Brien* case. These aspects of the prosecution of *amici curiae* raise serious and complex constitutional questions under the First Amendment. These questions will receive extensive factual and legal presentation at the trial of *amici curiae*.

It would be regrettable, we respectfully suggest, if this Court, in the course of deciding the *O'Brien* case, were to foreclose future judicial consideration on a fully developed factual record of the many complex questions of governmental regulation of speech arising in the case of *amici curiae*. If the relationship of the First Amendment to speech and writing about the draft laws and the war in Vietnam is to be decided by this Court in *O'Brien*, *amici curiae* believe that they should have the opportunity to brief and argue these questions before this Court.

Respectfully submitted,

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February 6, 1968.